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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 119

JOHN MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 120

CHARLES DEL MONICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. of both petitions) is reported at 355 F. 2d 999.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1966. Petitions for rehearing were denied on March 10, 1966. By order of Mr. Justice

Douglas, the time for filing petitions for a writ of certiorari was extended to May 7, 1966. Separate petitions were filed on May 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952 is constitutional.
2. Whether the statute embraces travel for the purpose of a single act of extortion.
3. Whether the substantive counts sufficiently alleged an offense under the statute.
4. Whether the trial court properly denied petitioners' motion for mistrial based upon material published by various news media during the trial.
5. Whether the prosecution could argue to the jury that portions of the testimony of one of its witnesses was untrue.
6. Whether the court erred in declining to instruct that the jury had to be unanimous not only as to its verdict, but also as to the specific manner in which petitioners performed each element of the offense.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion,

management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California petitioners were convicted of conspiring to travel in interstate commerce with intent to aid racketeering enterprises, and interstate travel with intent to commit extortion, in violation of 18 U.S.C. 371 and 1952.[1] Both petitioners were sentenced to imprisonment for five years on each count—Marshall's terms to run consecutively, Del Monico's terms to run concurrently. The court of appeals affirmed. 355 F. 2d 999.

[1] A judgment of acquittal was granted as to a third defendant, Allen Smiley (Tr. 1834–1835). Petitioners were found guilty of another substantive violation of 18 U.S.C. 1952, but the court granted a motion for acquittal as to that count (21 Tr. 60).

The evidence showed that on the afternoon of April 30, 1963, Marshall telephoned Ray Ryan, a wealthy businessman and gambler, in Palm Springs, California, and arranged to meet him later that day (Tr. 839, 915).[2] At 6:30 p.m., petitioners met Ryan as he left a barber shop in Palm Springs intending to be driven to the airport. Marshall "edged" Ryan into the front seat of a car driven by Del Monico, and they proceeded on a circuitous route to the airport (Tr. 919). After driving a while, Marshall told Ryan, "You owe Nick the Greek (unindicted alleged co-conspirator Nicholas Dandolas) $15,000, and we think you clipped him out of it" (Tr. 919).[3] Ryan denied the debt. Marshall indicated that he had other matters to discuss with Ryan at an appropriate time. Del Monico struck Ryan on the chest, declaring that the blow was meant "to show you we mean business" (Tr. 923). Prior to arriving at the airport, petitioners learned that Ryan's destination was Las Vegas, Nevada (Tr. 921).

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[2] The record of trial, filed with the Clerk of this Court, consists of 21 volumes. Volumes 2–20 contain the transcript of trial. Volume 21 contains the post-trial proceedings.

[3] The claim arose out of an extensive poker game between Ryan and Dondolas in 1949. The amount which Ryan won was estimated at less than $15,000 by Ryan (Tr. 1012, 1014), and more than $500,000 by Dandolas (Tr. 2295). Dandolas subsequently claimed that Ryan had cheated, and alleged that when confronted by Dandolas, Ryan had agreed to return $135,000 (Tr. 2286–2287), one installment of which was repaid long before this case arose (Tr. 341). Ryan testified that he never engaged in a conversation with Dandolas wherein he agreed to repay any money, and that in fact he had *loaned* Dandolas a total of $17,000 on three occasions (Tr. 1244, 1091–1098).

Late that evening Del Monico chartered a private flight for himself and Marshall to Las Vegas (Tr. 562–563). Marshall called Ryan at 2:30–3:00 a.m. on May 1, and they agreed to meet at noon in Ryan's hotel room in Las Vegas (Tr. 929–930, 1144). As Ryan was returning to his room after breakfast he passed Dandolas and Del Monico in the hallway. He invited Dandolas to his meeting with Marshall, but Dandolas declined (Tr. 932). In Ryan's hotel room, Marshall and Ryan again discussed the alleged debt. In addition, Marshall informed Ryan that his associates had in the past prevented Ryan from being kidnapped, and that Ryan must pay $60,000 per year for "protection" (Tr. 932). Ryan was amazed and fearful. He requested a confrontation with Dandolas. Marshall accompanied him out of the room and down a corridor where they were met by Del Monico and Dandolas. Del Monico attempted to usher Ryan out a side door (Tr. 933). Ryan managed to elude his captors and hurried into the lobby, where he telephoned the F.B.I. (Tr. 934–935).

ARGUMENT

1. Petitioners' challenge to the constitutionality of 18 U.S.C 1952 (Marshall Pet. 28–30; Del Monico Pet. 5–6) is without merit. The act is not an invasion of an area reserved to the States. On the contrary, the act is a congressional regulation of interstate commerce designed to curtail traffic supporting illegal activities "on an interstate scale beyond the reach of local enforcement agencies" (107 Cong. Rec. 13943). As noted by Chief Justice Taft,

in upholding the constitutionality of the Dyer Act, Congress was "merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks* v. *United States*, 267 U.S. 432, 436–437. See also *Bell* v. *United States*, 349 U.S. 81; *Turf Center, Inc.* v. *United States*, 325 F. 2d 793 (C.A. 9); *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915.

2. The argument (Del Monica Pet. 7–10) that the act prohibits only continuous business enterprises and not individual acts of extortion is refuted by the plain wording of the statute. Petitioners were charged with travel in interstate commerce with the intent to perform the acts prohibited by subsections (2) and (3) of 18 U.S.C. 1952(a), *i.e.*, the commission of any crime of violence with the intent to further any "unlawful activity" or the promotion or facilitation of any "unlawful activity". The term "unlawful activity", insofar as it pertains to the petitioners, is defined in subsection (b)(2) as "extortion * * * in violation of the laws of the State in which committed or of the United States." The "business enterprise" language is applicable only under the alternate definition in subsection (b)(1), which was not here involved.

The legislative history does not help petitioners. It is true that in testifying at the hearings on the proposed legislation, the Attorney General and his assistant directed their discussion primarily to subsection (b)(1), the concept of unlawful "business enterprise" which does involve a continuing course of conduct.

Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 468 *et. seq.*, 87th Cong., 1st Sess. (1961) at 34–35, 339. However, at the Senate hearing, the Attorney General plainly outlined the objects of the bill:

> Our purpose primarily is to prevent transmission of gambling information and equipment in interstate commerce; prevent travel in support of "business enterprises" involving gambling, liquor, narcotics, prostitution, or travel involving extortion or bribery * * * [Hearings before the Senate Committee on the Judiciary on S. 1653 *et. seq.*, 87th Cong., 1st Sess. (1961) at 17.]

3. Petitioner Marshall (Pet. 28–30) contends that the substantive count of the indictment does not state an offense under the statute, in that it does not specify the places where the acts of extortion were committed or the State statute which was violated.[4] Count 3 charged that on a certain date petitioners travelled in interstate commerce from Palm Springs, California, to Las Vegas, Nevada, with the intent "to commit a crime of violence to further unlawful activity, namely: extortion, and with intent to promote, manage, establish, carry on, and facilitate the promotion, management, and carrying on of * * * extortion." The

[4] Del Monico raises this and the ensuing issues only by incorporating by reference the questions raised in the Marshall petition. With regard to Del Monico there is no occasion to review a claim concerning the failure of one of two counts to state an offense, since the validity of the other count is not contested, and since he received equal concurrent sentences. *Lawn* v. *United States*, 355 U.S. 339, 359.

count then charged that thereafter petitioners performed and attempted to perform six specified acts in furtherance of their unlawful activity. The indictment is framed in the words of the statute. Since the indictment charges that petitioners travelled to Nevada and "thereafter" violated the statute, clearly the six specific acts were alleged to have been committed in Nevada. The count was limited to acts in one state, Nevada, and necessarily required proof of a violation of the Nevada extortion statutes.[5] Accordingly, the indictment met traditional requirements in that it contained the elements of the offense, apprised the petitioners of what they must be prepared to meet, and enabled them accurately to plead former conviction if any subsequent proceedings were brought against them for a similar offense. *Hagner* v. *United States,* 285 U.S. 427; *Russell* v. *United States,* 369 U.S. 749. In addition, the Nevada statutes were specified in the government's bill of particulars.

There is no merit in petitioners' complaint that the indictment violates due process because it does not define which of the two Nevada extortion statutes was involved. The indictment specified the particular conduct complained of. Therefore, if petitioners had had a defense that such conduct was not in violation of Nevada law, they were sufficiently apprised of the occasion to assert it.

The contention that the indictment alleged several methods of violating 18 U.S.C. 1952 is effectively an-

[5] These were described in full by the court in its closing instructions (Tr. 2651).

swered in *Turf Center, Inc.* v. *United States,* 325 F. 2d 793, 796–797 (C.A. 9):

> Where a crime, denounced disjunctively in the statute, is charged in the conjunctive, the proof of any one of the allegations will sustain a conviction. *Arellanes* v. *United States,* 302 F. 2d 603, 609 (9th Cir. 1962), certiorari denied, 371 U.S. 930 * * *. Thus, it is recognized that charging in one count the doing of the prohibited act in each of the prohibited modes redounds to the benefit of the accused. A judgment on a verdict of guilty upon that count will be a bar to any further prosecution in respect to any embraced by it. *Crain* v. *United States,* 162 U.S. 625, 636 * * *. See also, *Korholz* v. *United States,* 269 F. 2d 897, 900 (10th Cir. 1959), cert. den. 361 U.S. 929 * * * and Rule 7(c), Federal Rules of Criminal Procedure.

See also *Smith* v. *United States,* 234 F. 2d 385 (C.A. 5); *Johnson* v. *United States,* 207 F. 2d 314 (C.A. 5), certiorari denied, 347 U.S. 938.

4. Contrary to petitioners' arguments (Marshall Pet. 8–17; Del Monico Pet. 10–11) the judge handled the question of publicity with careful propriety. From the inception of the trial, the court noted with displeasure that petitioners' trial was receiving wide coverage in the Los Angeles news media (Tr. 205–211). During the voir dire the court instructed (Tr. 63):

> * * * if there should be anything about this case on the television or on the radio or in the newspapers, I ask you to avoid coming into

> contact with it to the extent that you can do so. You must listen to this case as it is unfolded here in the courtroom and make your decision entirely upon the basis of what you hear here in the courtroom and not what you may hear on the outside.

After the government had completed its case on the evening of January 27, 1964, the news media headlined a story about the bombing of an automobile in Chicago. The bombing victim had been under indictment together with petitioner Marshall on charges arising out of an insurance fraud, and was apparently expected to be a state's witness. The stories described Marshall's criminal associations, and one newspaper called him "reputedly one of the rising lords of Chicago crime syndicate" (Tr. 1888). On January 28, the court denied a motion for mistrial based on the adverse publicity,[6] and prior to adjourning for the day admonished the jury not to express any opinion regarding the case, and not to read, watch, or listen to the television, radio, or newspaper at all until the end of the trial (Tr. 1915–1916). As other stories about Marshall appeared, on January 29 the court vacated his denial of a mistrial, and, following the procedure suggested by defense counsel, interviewed each juror, and the one alternate, out of the presence of counsel and petitioners. The transcript of the judge's examination of the jurors was given to defense counsel (Tr.

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[6] The motion was made by both petitioners, although the news stories referred only to Marshall. Del Monico claimed that in view of his close connection with Marshall he was equally harmed by the statements.

1969–2062) and excerpts are included as Appendix D to Marshall's petition. As appears from the transcript, those jurors who had learned about the Chicago case had done so inadvertently, being unaware when they started to read about it that it related to defendant Marshall. The judge found that the jurors had been remarkably conscientious in heeding his prior admonitions to avoid reports of the trial. He also found that those jurors who had read or heard about the Chicago matter knew only that Marshall had a bad reputation in Chicago and would stand trial there. None thought they had been influenced or prejudiced by anything they had read, heard, or seen. The judge reported his findings to the defense counsel and denied their motion for mistrial (Tr. 2063–2067).[7] The motion was renewed subsequently but the judge noted that he was satisfied that the jury was aware of its duty and believed it could render a fair verdict (Tr. 2193). Thereafter the court frequently reminded the jurors that they were "not to converse with one another, nor allow anyone to converse with you, with respect to any matter relating to this trial. You are not to form or express any opinion as to any of the issues, and you are to refrain from reading any periodicals or news media, or looking at any television or listening to any radio or TV in the meantime" (Tr. 2332–2333, 2248–2249, 2316–2317, 2415, 2561–2562).

[7] One juror, who told the court that she was not influenced by the Chicago report because she had already made up her mind, even though the defense had not yet presented its case, was dismissed prior to the submission of the case to the jury (Tr. 2044, 2713).

"The trial judge," this Court has held (*Marshall* v. *United States*, 360 U.S. 310, 312),

> has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. * * *

There was no abuse of discretion in this case. A reading of the judge's careful and comprehensive questioning of the jurors and their apparently frank answers convincingly supports the judge's conclusion that the jury was determined to adhere to its duty to decide the case on the evidence and that the jurors' cursory knowledge of the reports concerning the Chicago incident would not impair their impartiality.[8] After January 28, prior to each daily adjournment and in his final instructions (Tr. 2662), the court stressed that the jurors must disregard any press, television, or radio reports that they might have read, seen, or heard and base their verdict solely on the evidence adduced in the courtroom. There is not the slightest showing that the jury did not follow the court's admonitions. See *Delli Paoli* v. *United States*, 352 U.S. 232, 242. The attitude of the jury, as revealed by the

[8] There is nothing to indicate that any juror saw or had any recollection of the reference to Marshall as an ex-felon in the story on the bombing (see Marshall Pet. 13–14). The article complained of (MM–11) appeared after the judge had expanded his admonition concerning the press to an instruction that the jury abstain from all newspapers and broadcasts for the duration of the trial.

court's questioning, was so co-operative and understanding that the judge could properly conclude that the jurors could be relied on to ignore the press.

5. At trial, Dandolas was a prosecution witness. Much of his testimony, while consistent with a pretrial statement he had given to the government, was inconsistent with the testimony of other prosecution witnesses. Dandolas testified that Ryan was indebted to him, although he denied authorizing petitioners to collect the debt. Ryan denied the debt. While recalling that he had met Marshall in 1949, Dandolas had no recollection of meeting Del Monico (Tr. 297, 341). Yet, Ryan and three other prosecution witnesses testified that Del Monico and Dandolas were seen together at the Las Vegas hotel on May 1, 1963, when Marshall and Ryan were to meet in the latter's room (Tr. 1103, 1416, 1421–1422, 1483). In closing argument the prosecutor suggested that Dandolas had not told the truth about his purpose in going to Las Vegas on the day in question (Tr. 2378).

This did not, as petitioners argue (Del Monico Pet. 11–13), constitute improper conduct by the government. *Pritchett* v. *United States,* 185 F. 2d 438 (C.A.D.C.), certiorari denied, 341 U.S. 905; *Thomas* v. *State,* 206 Ala. 416, 90 So. 295. Dandolas, an unindicted co-conspirator, was a material witness whom the government called because of his inextricable involvement in the case. In doing so, the prosecution fulfilled its obligation to disclose whatever might be in its possession which bore in any material degree on the charges. *United States* v. *Zborowski,* 271 F.

2d 661 (C.A. 2). The prosecution could disavow those portions of Dandolas' testimony which it believed to be untruthful. *Napue* v. *Illinois*, 360 U.S. 264, *Northern Pacific Ry. Co.* v. *Everett*, 232 F. 2d 488 (C.A. 9), *Pritchett* v. *United States*, *supra*. The cases cited by petitioners are inapposite, since they involve the intentional withholding of evidence or the failure of the prosecution to disclose that evidence it adduced was false.

6. The court properly instructed the jury (Tr. 2649–2711) that petitioners were to be convicted on Count 3 only if the jury found unanimously (1) that petitioners traveled in interstate commerce with the intent to commit a crime of violence in furtherance of the unlawful activity of extortion or otherwise to promote, manage, establish, carry on or facilitate such activity, and (2) that following such travel petitioners performed one or more of the six acts specified in the indictment to commit a crime of violence in furtherance of such activity or otherwise to promote such activity. The court's detailed instructions could have left no doubt that the commission of every element of the offense must be proved. The court was not required to give the instruction sought by petitioners (see Marshall Pet. 17–26, App. E) that the jury had to be unanimous as to each detail of the offense charged—*e.g.*, whether petitioners acted with the intent to promote extortion or to manage extortion or to carry on extortion. The specific manner in which a statute is violated may be important where different degrees of the crime charged or different sentences

therefor are embraced by the statute (*Andres* v. *United States,* 333 U.S. 740), or where a conviction on one of the alternative methods would be invalid (*Williams* v. *North Carolina,* 317 U.S. 287, 292; *Stromberg* v. *California,* 283 U.S. 359, 368; *Cramer* v. *United States,* 325 U.S. 1, 36). Here, however, the variant statutory characterizations of the several elements of the crime have no such significance.

7. The various claims of trial error asserted (Marshall Pet. 4–5) but not argued have been sufficiently answered by the exhaustive opinion of the court of appeals.

a. When the jury panel was asked whether any member was or had been *employed* as a law-enforcement or peace officer, one juror did not disclose that he possessed a special police officer's badge which had been given him in connection with his employment as a sports director for the Glendale Parks and Recreation Department (21 Tr. 12–44). The juror's silence was appropriate because he was not employed by the police[9] and had no authority to perform normal police duties.

b. The trial court properly admitted testimony by the victim, Ryan, of his frightened emotional state when he rode in Marshall's car and during the epi-

[9] The juror's only activity in connection with the police department was to escort the city's float to the assembly area for the New Year's Day parade. His status did not render him subject to a challenge for cause. *Cavness* v. *United States,* 187 F. 2d 719 (C.A. 9); *Deschenes* v. *United States,* 224 F. 2d 688 (C.A. 10).

sode in the Las Vegas hotel. See *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953.

c. Although neither petitioner took the stand, counsel for Del Monico in his closing argument made a variety of admissions regarding the evidence adduced by the prosecution, including an admission that Dandolas had authorized petitioners to collect a debt. He also stated, "we admit everything every witness said except Raymond Ryan" (Tr. 2455, 2441). In reply, government counsel noted that petitioners must be relying on Ryan's statement that they were "collecting" for Dandolas because Dandolas had denied giving such authorization (Tr. 2575–2576, 294–295) and there was "no one else [other than Ryan] that even testified on the subject." As noted by the court of appeals, counsel's remark cannot reasonably be considered as comment on the failure of petitioners to take the stand. Furthermore, the court instructed the jury that they were to draw no inferences from the failure of petitioners to testify, and that petitioners had a right to remain silent (Tr. 2643–2644).

d. After the case had been submitted to the jury, the judge decided that the evidence was insufficient to support a conviction on the substantive offense charged in Count 2 and he, accordingly, granted petitioners' motion for acquittal on that count. Contrary to petitioner's suggestion (Marshall Pet. 5), it does not follow that the evidence indicating a conspiracy, as charged in Count 1, to commit the substantive offense charged in Count 2 should have been stricken and removed from the jury's consideration.

e. There was no error in the refusal of the court to instruct the jury that where the government's case stands or falls on the belief of one witness, his credibility is subject to close scrutiny. This instruction is usually rendered where the primary witness is an accomplice, accessory, or informer. See *Gordon* v. *United States*, 344 U.S. 414; *On Lee* v. *United States*, 343 U.S. 747, 757. Ryan was none of these. As noted by the court of appeals, the trial judge rendered adequate cautionary instructions when he advised the jurors that they were the sole judges of credibility, listed the factors going to credibility, and instructed that the testimony of witnesses whose self-interest or attitude is such that it might tend to prompt testimony unfavorable to petitioners "should be considered with caution and weighed with great care" (Tr. 2642–2643).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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